The question then arises: what was the status of the deceased when he was riding on the lorry?

The second defendant had a timber concession in the jungle at Bukit Tinggi and 32 miles away in Seremban they had a sawmill. On the day of the accident their driver (the first defendant) drove the company lorry to the concession area, leaving at about noon and arriving at the area at about 2 p.m. He loaded up with timber and then left the area. Soon afterwards he arrived at the Government forest checking station in Kuala Pilah about 10 or 12 miles away where the timber was checked by the Forestry Department. He left the station and, on arriving near the Rex Theatre about a quarter of a mile away, the deceased (a forester working for the Forestry Department) stopped the lorry, asked for and was given a lift to Seremban. It is not unusual for timber lorries to give lifts to Forestry Department employees who wish to visit logging areas in the jungle and who wish to go to town. It was while they were on the way to Seremban that the lorry overturned and killed the deceased. The deceased's job included the inspection of forest areas and the inspection of sawmills. He supervised the concession belonging to the company. A forester may also have to inspect timber lorries at checking stations or on the way to sawmills to see whether royalty had been paid on logs being carried. But there was no evidence that the deceased was on duty when he boarded the lorry. On the evidence the learned trial judge's finding was that the deceased was merely getting a free lift.

There was no evidence that it was a term of the contract of employment between the deceased and the Forestry Department that he shall be carried in the second defendant's lorry, so it cannot be said that at the time of the accident he was being carried on the lorry "in pursuance of" a contract of employment between him and his employers, the Forestry Department.

There was evidence as stated that his employers, the Forestry Department, could have directed the deceased to travel in the lorry as part of his official duty to check timber on the lorry and the department would have been able to give that direction because of the relationship of employer and employee, but there was no evidence that the deceased was on the lorry on the fatal day on official duty, and in the face of the learned trial judge's positive finding that the deceased was then getting merely a free lift to Seremban, we are respectfully of the opinion that the learned judge was right in holding that the insurers are not liable under the policy to indemnify the defendants.

We would therefore dismiss this appeal with costs. Appellants' deposit to respondents against taxed costs.

Appeal dismissed.

Solicitors: *Atma Singh Gill & Co.; N. Ramachandran & Co.; Ng Ek Teong & Partners.*

THE CHARTERED BANK v. YONG CHAN

[F.C. (Azmi L.P., Ong Hock Sim and Raja Azlan Shah F.JJ.) March 11, 1974]

[Kota Kinabalu — Federal Court Civil Appeal No. 90 of 1973]

Practice and Procedure — Wrongful dishonour of cheque — Action founded on libel — Pleadings — Endorsement of claim — Limitation — Limitation Ordinance (Sabah Cap. 72).

Banking — Wrongful dishonour of cheque — Action for balance of contract — Account in name of partnership — Whether one partner can sue for breach of contract — Sabah Partnership Ordinance, 1961, s. 40.

The respondent had drawn a cheque on the partnership account with the appellant bank. The partnership had been dissolved and under the terms of dissolution the respondent was given authority to wind-up the partnership business and he continued to operate the partnership account. Subsequently, one of the former partners wrote to the bank asking the bank to stop withdrawals unless authorised by all three partners. When notified of this letter, the respondent objected to it. Subsequently, the respondent issued a cheque which was returned dishonoured with the answer "signature of all partners required". More than two years later the respondent issued a writ and on the pleadings based his claim on libel. The learned trial judge held that the action based on libel was statute-barred by virtue of the Sabah Limitation Ordinance. He, however, awarded a sum of $1,000 by way of damages for breach of contract. The appellants appealed.

Held, allowing the appeal: (1) the learned judge was clearly wrong when he concluded that the pleadings included a claim for breach of contract as well as a claim for libel;

(2) as the trial judge had decided on an issue not raised on the pleadings, the judgment must be set aside and a new trial ordered.

Observations on the right of a partner to sue for breach of contract with partnership.

Per Raja Azlan Shah F.J.: "A wrongful dishonour of a cheque gives rise to two possible causes of action, one for breach of contract and the other in tort, and in a proper case the practice has been to combine the two claims in one action; rules of pleadings determine how those claims may be so combined."

Obiter: The agreement (in this case) was not merely one that the bank should receive and hold money in joint account which is a joint contract, but also an agreement with each partner that it would honour cheques drawn by him individually unless there is written notice to the contrary which entails obligations to each of them severally. In the circumstances it is not possible to accept as an unqualified proposition the contention advanced in this appeal on behalf of the bank that in an action for breach of contract made with several persons jointly, they should all join in such action.

Cases referred to:-

(1) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218, 238.
(2) *Tan Ah Sam* v. *Chartered Bank* [1971] 1 M.L.J. 28.
(3) *Haji Mohamad Dom* v. *Sakiman* [1956] M.L.J. 45.
(4) *Khiaw Aik Heng Co. Ltd.* v. *Tan Tien Choy* [1964] M.L.J. 99.
(5) *Twibell* v. *London Suburban Bank* [1869] W.N. 127.
(6) *Arden* v. *Bank of New South Wales* [1956] V.L.R. 569.

FEDERAL COURT.

Peter Mooney for the appellant.

Shelley Yap Yeok Siew for the respondent.

Raja Azlan Shah F.J.: This appeal raises points of intricacy and commercial importance. The action was in respect of a claim for damages based on a wrongful dishonour of a cheque drawn by the respondent on the partnership account with the appellant

bank ("the bank"). In the court below the respondent was the plaintiff and the bank the defendants. The trial judge, after hearing the evidence awarded a sum of $1,000 by way of damages for breach of contract. However, he declared that the action founded on libel was statute-barred by virtue of item 11 of the Schedule to the Sabah Limitation Ordinance (Cap. 72).

The following facts were either proved or not in dispute. The partnership firm of Wing Kwong Brothers, Sandakan, trading as general importers and exporters, was formed immediately after the liberation in 1946. The original partners consisted of three brothers — the respondent, Yong Kee and Yong Cheong. After Yong Cheong's death his share was transmitted to his son Yong Kah Lam. The partnership opened an account with the bank. The respondent and Yong Kee were the only partners authorised to sign cheques for and on behalf of the firm. In 1948 the bank attempted to regularise the position when they requested the respondent and Yong Kee to sign a standard form. It would appear that there was no specimen signature of the respondent. Apparently he was in Hongkong at that time. Yong Kee alone signed a mandate on April 13, 1948 on behalf of the firm.

It is pertinent to reproduce the mandate:

"We, the undersigned (1) Yong Chan and (2) Yong Kee, of Sandakan, British North Borneo, in co-partnership as General Importers and Exporters under the name and style of Wing Kwong Brothers hereby request you to open a Current Deposit Account for us in the name of the said firm of Wing Kwong Brothers and, until written notice from us to the contrary, to regard us as partners and to honour our respective signatures on behalf of the said firm as under.
We agree to be jointly and severally liable on the said account and to comply with, and to be bound by, the rules of the bank for the time being. Kindly provide us with a pass-book and a book of cheque forms for our use.

Yours faithfully,
for WING KWONG BROTHERS

Mr. Yong Chan will sign thus ... (Yong Chan)

Mr. Yong Kee will sign thus ... (Yong Kee)."

Due to differences between the two brothers the firm was dissolved on February 14, 1966. Since then it ceased to do business as a going concern. At the time of dissolution the partners were the respondent, brother Yong Kee and nephew Yong Kah Lam. The firm had a credit balance of $85,849.34 with the bank. One of the terms of dissolution was that the respondent was given authority to wind up the partnership business, such as retaining a solicitor to collect outstanding debts and signing cheques connected with the winding-up. He in fact continued to operate the partnership account.

Yong Kee left the firm. Two years had passed and there was still no sign of getting his share of the money in the bank. He thought the money should be distributed instead of lying idle. So on July 29, 1968 he unilaterally wrote to the bank stopping all withdrawals from the partnership account "unless authorised by all three partners, until such time that negotiations have been effected to sort out the accounts." There was no mention of dissolution.

The following day the bank notified the respondent of the new mandate and advised him that no further withdrawals would be allowed without the authority of the three partners.

The respondent took objection to that letter. On August 1, 1968 he wrote to the bank stating that the partnership was dissolved on June 30, 1966 and that he had authority to wind up the partnership business. He challenged Yong Kee's authority to act on behalf of the dissolved partnership.

On August 26, 1968 the respondent again wrote to the bank reiterating the fact that he was still carrying on with the winding-up of the partnership affairs. He also stated this important point, that as the firm was committed to be responsible for retaining the services of Mr. Shelley Yap Yeok Siew as the firm's solicitor, he had on that day issued a cheque for $500 in his favour being the annual retainer fee for August 12, 1968 to August 11, 1969 and asked them to honour the said cheque. On or about September 5, 1968 Mr. Shelley Yap Yeok Siew presented the said cheque through the Chung Khiaw Bank Ltd., Sandakan to the bank for payment but was returned dishonoured with the answer "signature of all partners required".

The writ was issued on November 3, 1970. So far as the claim based on libel is concerned I agree with the trial judge that it must necessarily fail. It was statute-barred.

In the court below arguments were directed on the issue of libel only. Mr. Hawkins who then appeared for the bank submitted that the respondent did not plead breach of contract. Mr. Shelley Yap Yeok Siew on behalf of the respondent contended that the pleadings as they stand included a claim for breach of contract.

That brings me to the submission of Mr. Peter Mooney who appeared for the bank in this appeal. Counsel submitted that the learned judge was wrong in fact and in law in holding that the pleadings included a claim for breach of contract and a claim for libel. This submission leads me at once to a consideration of the pleadings, in order to see exactly what were the issues raised thereby.

Now, the general endorsement of the respondent's claim is for damages for injuries in his character and reputation occasioned to him by the bank, who wrongly acted on the instructions of Yong Kee. The pleadings in the respondent's statement of claim state that he was a senior partner of the dissolved firm, that on dissolution there was an arrangement that he was to look after the affairs of the dissolved partnership, that he continued to sign cheques, that the bank were the firm's bankers, that they were the customers of the bank, that on August 26, 1968 he drew a cheque on the partnership account for a sum of $500 in favour of Mr. Shelley Yap Yeok Siew and it was returned dishonoured with the answer "signature of all partners required". And by paragraph 7 he states:

"By the said words 'signature of all partners required' the defendants meant and were understood to mean that the plaintiff was in bad faith and had no power to handle the affairs of the dissolved partnership. There had never been any previous arrangement between the bank and the customers requiring signatures of all partners."

Paragraph 8 states:

"The plaintiff has in consequence been seriously injured in his character, credit and reputation."

I have set out the pleadings in some detail in order to show that no complaint was made that the bank had wrongfully and in breach of its duty dishonoured the said cheque. The learned judge took the view that it was immaterial whether the respondent's claim was to recover damages for breach of contract or for libel because he was of the opinion that the two actions can and sometimes are combined in one, and he therefore concluded that the statement of claim was framed in such a way that it included damages for wrongfully refusing to honour the said cheque and for libel contained in the written answer.

With respect I cannot help thinking that the learned judge took rather a wrong view of what is truly the function of pleadings. While it is legitimate to say that a wrongful dishonour of a cheque, in itself, gives rise to two possible causes of action, one for breach of contract and the other in tort, and that in a proper case the practice has been to combine the two claims in one action, rules of pleadings determine how those claims may be so combined. Now the function of pleadings is to give fair notice of the case which is to be made so that the opposing party may direct his evidence to the issue disclosed by them. See *Esso Petroleum Co. Ltd.* v. *Southport Corporation.*[1]

In the court below the case made against the bank rested entirely on the allegation of libel. If the respondent's pleadings had been put in the alternative, either that there was breach of duty or that the answer on the dishonoured cheque was libellous, the case would no doubt had been developed on wholly different grounds. It is idle at the present stage to speculate what evidence might have been adduced by either side on the other allegation, and what would have happened if such a case had been made. Lord Radcliffe puts the matter succinctly in the above case (page 244):

"In my view, where the question is, as here, as to sufficiency of evidence, the state of the pleadings is of more importance than the way in which the case is shaped in argument. It is clear that no application was made to the trial judge to amend the pleadings by altering or extending the particulars, and it is equally clear from what he says at the close of his judgment that he did not regard himself as having expressly or impliedly authorised any such amendment. That being so, I am of opinion that the appellants called as much evidence as was required of them to defend themselves from the charges of negligence that were made in this case."

In that case the trial turned upon the issue of negligence i.e., navigational error, and not upon the issue of unseaworthiness.

In my opinion the learned judge was clearly wrong when he concluded that the pleadings included a claim for breach of contract as well as a claim for libel.

If it was intended to combine the two claims in one action, then, (1) the general endorsement of claim should be for damages for dishonouring cheque and for libel. (See *Atkins* Court Forms. Second edition. Vol. 6, precedent 20, page 241), (2) an additional paragraph should have been inserted after paragraph 4 of the statement of claim to the effect

"In the premises it was the duty of the defendants to honour any cheque drawn on the defendants by the plaintiff and duly presented for payment provided there were sufficient funds standing to the credit of the plaintiff's account."

(3) Paragraph 6 should have been amended to read,

"On or about September 5, 1968 the said cheque was presented to the Chartered Bank, Sandakan but it was *wrongfully and in breach of the said duty* dishonoured and returned to the said payee with a note stating 'signature of all partners required'."

(See *Atkins* Court Forms, *supra*, precedent 32, page 246). The allegation of breach of duty to honour a cheque was pleaded in *Tan Ah Sam* v. *The Chartered Bank.*[2]

In my opinion the pleadings in the statement of claim are not in ideal form. If we are to maintain a high standard in our trial system, it is indubitably not to treat reliance upon forms of pleadings as pedantry or mere formalism.

An erroneous direction on the pleadings is ground for ordering a new trial. That is the result of two earlier decisions in which the effect of an erroneous ruling as to the issues raised in the pleadings was the point under consideration. See *Haji Mohamed Dom* v. *Sakiman;*[3] *Khiaw Aik Heng Co. Ltd.* v. *Tan Tien Choy.*[4] Since the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and a new trial ordered.

I only wish to consider one important point, namely, the submission of Mr. Peter Mooney that if there was a breach of contract by the bank, it was breach of contract with the partnership and the learned judge ought to have held that the respondent had no individual right to sue on this ground and therefore his claim must necessarily fail. As for myself the matter can be disposed of simply. It turns on the question whether in a contract made with several persons jointly, they should all join in the action upon such a contract (see *Mallal's* Supreme Court Practice, page 161).

It is commonplace that the right of action founded on contract is vested in all partners jointly and they are all proper parties to the action. But there may be cases where the same facts give rise to several as well as joint rights of action.

It is necessary therefore to analyse the agreement made between the partners and the bank. Under the Sabah Partnership Ordinance, 1961 every partner is an agent of the firm and his other partners for the purpose of the partnership business (section 7), unless they agree to some restriction in which case no act done in contravention of that agreement is binding on the firm with respect to persons having notice of it (section 10). The net result of those sections is that unless a bank has notice to the contrary, it is entitled to honour cheques drawn on a partnership account by any of the partners, but not when it has such notice.

Now the agreement was that the bank would open a partnership account in the name of the firm, and until written notice from the partners to the contrary, to regard them as partners and to honour cheques

drawn by them severally. This condition entitling each partner to draw cheques was obviously inserted for the convenience of the partnership business because it is clear from the evidence that when the respondent was abroad Yong Kee had drawn cheques in the firm's name. It can therefore be seen that the agreement was not merely one that the bank should receive and hold money on a joint account which is a joint contract, but also an agreement with each partner that it would honour cheques drawn by him individually unless there is written notice to the contrary which entails obligations to each of them severally. In simple language there are two contracts arising separately. One is a joint contract between the bank and the firm to open a joint account, and the other is a contract between the bank and each of the partners severally to honour cheques.

In arriving at this view I have been greatly assisted by two Commonwealth cases which seem actually to cover the point. I realise that both these cases do not bind this court, but I know of no reason why I should not welcome a breath of fresh air from the Commonwealth.

In *Twibell* v. *London Suburban Bank*(5) the plaintiff and his partner at the time of opening an account at the defendant bank stipulated that no cheque drawn in the name of the firm by one of the partners should be honoured by the bank unless it bore the initials of the other partner. The bank in violation of that undertaking, honoured a cheque drawn on the firm's account by one partner, without the initials of the other. The court held that the plaintiff was entitled to sue for this breach of contract. That case was followed by the Supreme Court of Victoria in *Arden* v. *Bank of New South Wales*.(6) In that case also there was an arrangement with the bank that all the firm's cheques must be signed by two partners. The question arose as to whether the implied undertaking by the bank that cheques not so signed would not be cashed constituted a promise to both the partners jointly or to each of them severally. The court following *Twibell's* case held that the bank's implied undertaking to honour cheques, only if they were signed by both partners, inured for the benefit of each partner severally and therefore, a partner could sue the bank in his own name to recover damages for the breach of that undertaking.

In the circumstances it is not possible to accept as an unqualified proposition the contention advanced in this appeal on behalf of the bank that in an action for breach of contract made with several persons jointly, they should all join in such action.

I have enjoyed the privilege of a full review of the authorities closely or remotely bearing upon the question of breach of contract and of listening to very careful and illuminating arguments from counsel. But in the end the result seems to depend on a rather simple principle and conclusion affecting, first, the law governing the relationship of banker and a dissolved partnership, and secondly, its application to the facts.

Such relationship is governed by section 40 of the Sabah Partnership Ordinance, which reads as follows:

"After the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise."

The section speaks for itself. The dissolution revokes the authority of a partner to bind his co-partners except in so far as it is preserved by the instant action. That is to say, the partnership remains in being and any existing relationship of banker and the partners continue but only for the purpose of completing transactions begun but unfinished at the time of dissolution, winding-up the business and adjusting the rights of the partners, but not otherwise. The banker in such a case is safe to deal with the partners only to such an extent as is clearly within this purpose.

The course of action to be taken by the bank in regard to the account of the dissolved partnership must now depend upon the circumstances. What are the circumstances and whether the circumstances justify an action for breach of contract must be left to be decided at the new trial.

The appeal is allowed with costs. There will be a new trial. Costs incurred in the court below to abide the result of the new trial.

Azmi L.P. and **Ong Hock Sim F.J.** concurred.

Appeal allowed. New trial ordered.